82-1582

No._____

reme Court, U.S.
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MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

CENTRAL MILK PRODUCERS COOPERATIVE,
Petitioner,

vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a non-profit collective bargaining association of farmers which claims the right to bargain on a non-pecuniary basis and engage in horizontal price fixing on behalf of its members by reason of an antitrust exemption conferred by §6 of the Clayton Act, 15 U.S.C. §17, and the Capper-Volstead Act, 7 U.S.C. §291, has standing to sue for lost membership dues and fees as antitrust damages pursuant to §4 of the Clayton Act, 15 U.S.C. §15?

2. Whether proof of a relevant geographic market is a necessary element to support a conspiracy to monopolize claim under §2 of the Sherman Act or a non-*per se* conspiracy claim in unreasonable restraint of trade under §1 of the Sherman Act?

3. Whether, under §4 of the Clayton Act:

(a) Attorney's fees awarded to a party who has prevailed on appeal on a portion of its claim should be apportioned to reflect the extent to which it has prevailed;

(b) Expenses of litigation, not specifically identified as "costs" under Fed.R.Civ.P. 54(d) and 28 U.S.C. §1920, are recoverable as "cost of suit"?

LIST OF PARTIES

Pursuant to Rule 21(b), Rules of the Supreme Court, Counsel for Petitioner certifies that the following is a complete list of all parties to the proceeding below:

Associated Milk Producers, Inc., Mid-American Dairymen, Central Milk Producers Cooperative, National Farmers Organization and Associated Reserve Standby Pool Cooperative.

Petitioner Central Milk Producers Cooperative has no parent or subsidiaries and has the following members as affiliates:

Alto Cooperative Creamery
Waupun, Wisconsin

Associated Milk Producers, Inc.,
Mid-States Region
Schaumburg, Illinois

Chaseburg Cooperative
Chaseburg, Wisconsin

Consolidated Badger Cooperative
Shawano, Wisconsin

Golden Guernsey Dairy Cooperative
Milwaukee, Wisconsin

Independent Milk Producers Cooperative
Slinger, Wisconsin

Lake to Lake Dairy Cooperative
Manitowoc, Wisconsin

Manitowoc Milk Producers Cooperative
Manitowoc, Wisconsin

Mid-West Dairymen's Cooperative
Rockford, Illinois

Milwaukee Cooperative Milk Producers
Brookfield, Wisconsin

Outagamie Producers Cooperative
Black Creek, Wisconsin

Pine River Farmers Dairy Cooperative
Merrill, Wisconsin

Wisconsin Dairies Cooperative
Baraboo, Wisconsin

Woodstock Progressive Milk Producers
Woodstock, Illinois

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CENTRAL MILK PRODUCERS COOPERATIVE,
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vs.

NATIONAL FARMERS ORGANIZATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Central Milk Producers Cooperative ("CMPC") respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this matter on August 31, 1982, reversing, in part, the January 29, 1981 judgment of the district court in favor of CMPC, Associated Milk Producers, Inc. (AMPI) and Mid-America Dairymen, Inc. (Mid-Am).

OPINIONS BELOW

The opinion of the Court of Appeals (App. at 1a)* is reported at 687 F.2d 1173. The opinion of the district court (App. at 67a) ordering judgment against respondent on its antitrust claims and in favor of petitioner is reported at 510 F.Supp. 381 (W.D. Mo. 1981). The order of the Court of Appeals awarding costs and attorneys fees on appeal is reported at 696 F.2d 1210 (8th Cir. 1983) and appears in Petitioner's Appendix hereto (P. App. at 3a).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 31, 1982. The Court of Appeals denied petitioner's timely petition for rehearing *en banc* and suggestions for rehearing on November 10, 1982** (App. at 376a). By this Court's Order of February 25, 1983 the time for filing this petition was extended to March 25, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this petition include sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, sections 4 and 6 of the Clayton Act, 15 U.S.C. §§15, 17 and section 1 of the Capper-Volstead Act, 7 U.S.C. §291. The pertinent portions appear in Petitioner's Appendix hereto (P. App at 1a).

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* The reference "App." is to the Appendix to the Petition for Writ of Certiorari filed by National Farmers Organization, Inc. in Docket No. 82-1324 on February 8, 1983.

** Judge Ross would have granted the petition.

STATEMENT OF THE CASE

This case presents the anomaly of a national organization of farmers devoted to political action and collective price fixing being granted the right to recover antitrust damages for lost membership dues because of defendants "monopolizing" conduct without ever having defined the "market" that defendants are charged with conspiring to monopolize. The case also raises the question whether the antitrust laws are intended to provide a remedy for a speculative membership loss which attenuates respondent's power to fix prices or achieve the monopoly power which it seeks.

The Proceedings Below

On March 12, 1971 Mid-Am, a cooperative marketing association of dairy farmers, filed an antitrust treble damage action against the National Farmers Organization (NFO) alleging that NFO violated §1 of the Sherman Act by promoting a group boycott of Mid-Am and engaging in illegal price fixing in the sale of its members' raw milk. 687 F.2d at 1181; App. at 6a. Mid-Am claimed that NFO was not entitled to the antitrust exemptions conferred by §6 of the Clayton Act and the Capper-Volstead Act because NFO was not a bona fide association of farmers within the meaning of those acts. 687 F.2d at 1183; App. at 11a. NFO filed an antitrust counterclaim against Mid-Am and joined AMPI and thereafter CMPC and Associated Reserve Standby Pool Cooperative (ARSPC), three dairy farmer cooperatives, as additional counterclaim defendants.[1]

The NFO counterclaim alleged that CMPC, AMPI, ARSPC and Mid-AM monopolized, attempted to monopolize and con-

[1] Mid-Am's case against NFO (Phase I) was separately tried to the district court. *See* 510 F.Supp. at 385; App. at 71a. NFO's counterclaim is referred to as Phase II of the litigation.

spired to monopolize the marketing of raw milk in violation of the Sherman Act in "a ten state region" of the Midwest or "ten federal order markets therein" [2] (687 F.2d at 1191, App. at 26a) by conduct designed to depress the price received by NFO members for their raw milk and to stifle NFO's growth by depriving its members of access to milk buyers. 687 F.2d 1193-94; App. at 31a-33a.

As to Mid-Am's "Phase I" claim, the district court concluded that NFO's activities did not constitute price fixing and, therefore, found it unnecessary to reach the merits of NFO's Capper-Volstead exemption defense. 687 F.2d at 1183; 510 F.Supp. at 423-426; [3] App. at 11a, 150a-55a. The "Phase II" counterclaim, tried to the district court over an eighteen month period, resulted in entry of judgment dismissing NFO's §§1 and 2 Sherman Act claims on the basis of the court's "ultimate determination that . . . NFO failed to carry the burden of proof in regard to all Phase II issues necessary to establish liability on the part of counterclaim defendants." 510 F. Supp. at 434; App. at 173a. The district court found specifically that NFO failed to prove a properly defined relevant geographic market or that the defendant cooperatives monopolized, attempted to monopolize or conspired to monopolize the marketing of milk in any properly defined market. 510 F. Supp. at 502-03; App. at 318a-319a.

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[2] A "federal order market" is a defined geographic area in which the marketing of milk is regulated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937. 7 U.S.C. §601 *et seq.* *See* 510 F.Supp. at 442; App. at 190a.

[3] The district court noted, however, that in view of this Court's holding in *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978) "had we reached and decided the merits of the question of [NFO's Capper-Volstead exemption], we would have rejected NFO's Capper-Volstead [defense]". 510 F.Supp. at 426; App. at 155a.

Though petitioner had urged from the outset that NFO lacked standing to sue for alleged "price reduction" damages suffered by its members or loss of membership dues,[4] the district court concluded that it was unnecessary to reach the question of whether NFO was injured in its business or property or whether it had standing to maintain the action. 510 F.Supp. at 503; App. at 320a.

On appeal, the Eighth Circuit affirmed the district court's dismissal of Mid-Am's Phase I claim but on different grounds. The Eighth Circuit concluded that NFO engaged in horizontal price-fixing but held that its price-fixing on behalf of the members was exempt conduct under the Capper-Volstead Act. 687 F.2d at 1183-84; App. at 11a-12a.

Dismissal of NFO's Phase II claim was affirmed in part and reversed in part. Though the Eighth Circuit concluded, contrary to the district court, that CMPC, Mid-Am and AMPI conspired to eliminate NFO as a competitor in the marketing of raw milk by conduct unprotected by the Capper-Volstead Act (687 F.2d at 1179; App. at 3a), it affirmed the district court's dismissal of NFO's actual and attempted monopolization claims because of NFO's failure to show that the defendant cooperatives possessed "monopoly power in a properly defined market or sub-markets." [5] 687 F.2d at 1192; App. at 29a.

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[4] NFO's damage claim of $14,064,068.76 included $12,851,000 of "lost penetration damages" attributable to loss of member dues and "checkoff" and approximately $1,213,000 of "price reduction damages" allegedly suffered by its members. 510 F. Supp. at 435, n. 27; App. at 174a; *see* 687 F.2d at 1208-09; App. at 62a.

[5] "The burden to show monopoly power or 'dangerous probability' of it . . . is on NFO. We cannot say it was clearly erroneous for the district court to find that NFO's statistical evidence was not sufficiently well defined to support its claims of actual and attempted monopolization. Accordingly, we affirm the dismissal of such claims." 687 F.2d at 1192; App. at 29a.

As to the conspiracy to monopolize claim, however, the Eighth Circuit reversed. The Circuit Court held that a §2 Sherman Act conspiracy to monopolize claim does not require proof of a relevant market because the essential elements of the claim "are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affected 'some appreciable part of interstate commerce.' *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir 1971)." 687 F.2d at 1181-82; App. at 8a.

As to petitioner's argument that NFO lacked standing to maintain the action (which the district court failed to address), the Eighth Circuit agreed that NFO cannot recover "price reduction" damages suffered by its members (687 F.2d at 1208; App. at 62a) but held that NFO is entitled to recover lost membership dues and fees because such losses "represent direct injury to NFO in its 'business or property'." *Id.* at 1209; App. at 63a.

The Parties

Respondent NFO is a nationwide organization of farmers incorporated as a non-stock, non-profit membership corporation under Iowa law. Originally organized in 1955 as a protest movement against federal agricultural policy, it amended its articles of incorporation in 1957 to add as an object and purpose collective bargaining "on a non-pecuniary basis for prices, terms and conditions of sale" of its members' farm products. 510 F.Supp. at 388; 687 F.2d at 1180; App. at 5a, 78a. NFO's members produce a general array of farm products including milk, livestock and grain. As expressed in its By-laws, NFO's avowed purpose and principal aim is "to unite into one organization . . . all farmers engaged in the production of agricultural commodities" (510 F.Supp. at 388; App. at 78a) in order to exercise sufficient market power to raise

the price of its members' farm products above the level that would obtain in a competitive market. 687 F.2d at 1180; App. at 4a-5a. NFO's announced objective is to "block or unite enough production . . . under control of [its] members so, that those members can . . . name their price, and if the price wasn't paid, to hold the production." 510 F.Supp. at 408; App. at 118a. To obtain the price it desires, NFO's bargaining strategy has included picketing and "holding actions" comparable to a strike in the labor field. 510 F.Supp. at 389; App. at 80a.[6]

NFO receives member dues and "checkoff" fees forwarded to it from the proceeds of the sale of its members' farm products. In the case of milk such proceeds are paid by the buyer to an "NFO Dairy Trust" which, in turn, deducts and remits to NFO such dues and "checkoff" as the member has authorized to defray NFO's collective bargaining expenses. 510 F.Supp. 396, 407; *see* 687 F.2d 1184, 1208-09; App. at 94a; 13a, 61a-62a.

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[6] Respondent NFO does not itself sell any farm commodity. 510 F.Supp. at 389, 401; App. at 79a, 104a. "The stipulated facts show that NFO . . . gives collective bargaining and marketing services exclusively to its members in connection with their agricultural commodities." 687 F.2d at 1184; App. at 13a. The stipulated facts also show that NFO is "forbidden [by its By-Laws] to enter into, or engage in any business in behalf of or in the name of the organization, of the sort commonly engaged in by cooperatives for profit" or from distributing any income to its members. 510 F.Supp. 388-89; 687 F.2d at 1184, 1208; App. at 79a; 13a. Hence, NFO is organized in such a way that it has no earnings or net income from the sale of its members' milk. 510 F.Supp. at 389; App. at 79a. In 1957, NFO was ruled to be exempt from federal income tax as a non-profit membership organization pursuant to I.R.C. §501(c)(5).

Mid-Am and AMPI are both cooperative associations of dairy farmers engaged in collectively marketing the milk of their dairy farmer members to "handlers" [7] who operate fluid milk bottling plants throughout the midwestern region of the United States.

Petitioner CMPC is a "common marketing agent" [8] for 15 dairy cooperatives whose dairy farmer members, located principally in Wisconsin, supply milk solely to handlers regulated under Federal Milk Order No. 30 (7 C.F.R. Part 1030) which regulates the handling of milk in a geographic area described as the "Chicago Regional Marketing Area". 7 C.F.R. §1030. 687 F.2d at 1180, 1194; App. at 5a-6a, 32a.

REASONS FOR GRANTING THE WRIT

I. In Ruling That Respondent Has Standing To Sue For Lost Membership Dues And Fees The Eighth Circuit Follows A Rule Of Antitrust Standing That Has Been Repudiated By This Court And Other Courts of Appeal.

The Eighth Circuit held that respondent NFO has standing under §4 of the Clayton Act, 15 U.S.C. §15, to recover lost membership dues and fees because it "was a direct target of

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[7] The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601, *et seq.*, authorizes the Secretary of Agriculture to regulate "handlers" of certain agricultural commodities, including milk, under a federal marketing order.

[8] The Capper-Volstead Act, 7 U.S.C. §291 provides in part that "[P]ersons engaged in the production of agricultural products . . . may act together in associations . . . in collectively processing . . . and marketing . . . such products of persons so engaged. Such associations may have marketing agencies in common; and . . . may make the necessary contracts and agreements to effect such purposes. . . ."

the unlawful conspiracy." 687 F.2d at 1209; App. at 63a. That conclusion ignores the teaching of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), as more fully articulated by this Court last term in *Blue Shield of Virginia v. McCready*, —— U.S. ——, 102 S.Ct. 2540 (1982), and more recently in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, —— U.S. ——, 51 U.S.L.W. 4139, 4144 (February 22, 1983), that more must be shown for recovery under §4 than the plaintiff was the "target" of defendant's unlawful conduct. Notwithstanding the broad remedial purpose of §4, this Court noted in *McCready* that "our cases have acknowledged two types of limitations on the availability of the §4 remedy to particular classes of persons and for redress of particular forms of injury.", *id.* at 2545-46, limitations derived from *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), *Illinois Brick* and *Brunswick*.

A. The Eighth Circuit's Opinion Permits §4 Clayton Act Damages To Be Recovered For The Kind Of Abstract Injury Barred By Controlling Decisions Of This Court.

In *Illinois Brick*, this Court held, on the basis of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) that indirect purchasers were barred from recovering damages under §4 of the Clayton Act because of the "evidentiary complexities and uncertainties" (*Illinois Brick, supra*, 431 U.S. at 732) in determining the extent to which an illegal overcharge was passed on through the distribution

chain.[9] In *McCready*, the Court again noted that the "feasibility and consequences of implementing particular damage theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under §4." 102 S.Ct. at 2546-47, n. 11.

The Eighth Circuit's failure to consider whether NFO's "claim rests at bottom on some abstract conception or speculative measure of harm" (*ibid.*) collides squarely with the rationale of *Illinois Brick*, applied in other contexts, barring §4 Clayton Act claims based on a "tenuous and speculative character of the relationship between the alleged antitrust violation and [NFO's] alleged [loss of membership dues]", *Associated General Contractors, supra*, 51 U.S.L.W. at 4146, which the judicial system cannot effectively accommodate. *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 584-85 (3d Cir. 1979); *GAF Corp. v. Eastman Kodak Co.*, 519 F.Supp. 1203, 1232-33 (S.D.N.Y. 1981).

NFO is more than a collective bargaining association. It is a political and social action organization. 510 F.Supp. 388, 454; App. at 78a, 215a. Dairy farmers may leave or refrain from joining NFO because of disagreement with its political or economic policies rather than "by reason of" defendants alleged anticompetitive conduct. Dairy farmers' reasons for

[9] "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economists hypothetical model,' 393 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick, supra*, at 731-32; *see id.* at 741; *see also Hawaii v. Standard Oil, supra*, 405 U.S. at 262-63, n. 14.

joining or leaving respondent are as varied as their number.[10] To establish a "causal link" between respondent's lost membership dues and fees and defendants' alleged anticompetitive conduct would require probing of the minds and "actions of innumerable individual decision-makers," *Reading Industries, supra*, 631 F.2d at 13, among the dairy farmers in the ten state area of the Midwest in which respondent claims its membership growth was stunted to determine why, as the record herein discloses, (1) some producers market their milk through the defendant cooperatives but continue to pay dues to NFO; (2) some producers continue to join NFO despite defendants' alleged anticompetitive conduct; (3) some producers joined as members of NFO though they received a lower price for their milk; (4) some producers remained as members of NFO but refused to pay their dues; (5) some producers market grain or livestock through NFO but their milk through defendants or; (6) why the investment in and loyalty of some producers to defendant cooperatives acted as a bar to repondent's solicitation efforts. *Cf. Associated General Contractors, supra*, 51 U.S.L.W. at 4146.[11]

While the commodity "milk" may constitute a relevant product market capable of being restrained or monopolized,

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[10] NFO's principal dairy operative in the Midwest testified that the "pay price" received by NFO's members is "just one of" many considerations "in terms of . . . where they sell their milk" but "it is not the main important factor." He testified that other factors of importance are "the goals and aspirations of the organization that they belong to, the loyalty that they have to the organization, the feeling and relationship that they have with individuals within the organization . . . market style . . . the overall strategy in terms of the farmer's total income, not strictly his dairy income. . . . I think of an organization that is involved in an all-commodity has an effect on the producer as to whether he ships with one group or another" (Tr. at 5465).

[11] Justice Stevens noted that because the Union's alleged injury "may have been produced by independent factors, the Union's damages claim is . . . highly speculative." 51 U.S.L.W. at 4146.

dairy farmer membership in a politically active national farm organization is another matter. A dairy farmer's organizational affiliation is not a "product" capable of being restrained or monopolized. The link between respondent's unrealized growth in membership and defendants' conduct is based on "conjectural theories of injury and attenuated economic causality", *Reading Industries, supra*, at 14, that are fraught with too many "evidentiary complexities and uncertainties" (*Illinois Brick, supra*, at 732) to support a claim for recovery of lost membership dues and fees under §4 of the Clayton Act.

B. The Eighth Circuit's Decision Holding That Lost Membership Dues Are Recoverable As Antitrust Damages Under §4 Of The Clayton Act Is In Conflict With The Holding Of *Brunswick, Associated General Contractors* And The Decisions Of Other Circuits.

NFO is organized for the purpose of acquiring membership sufficient to enable it to exercise the power to fix prices of the commodities sold by its members. 687 F.2d at 1180, 1183-84; App. at 5a, 11a-12a. The Eighth Circuit held, nonetheless that NFO suffered compensable *antitrust* damages when its price-fixing power was eroded by membership losses "attributable to defendants' unlawful conduct", 687 F.2d at 1209; App. at 63a, because "NFO, as a competitor, was a direct target of the unlawful conspiracy." *Ibid.*

Such a result stands the Sherman Act on its head and collides squarely with the holding in *Brunswick Corp. v. Pueblo Bowl-O-Mat, supra*, "that for [respondent] to recover treble damages . . . [it] must prove more than injury causally linked to an illegal presence in the market. [Respondent] must prove *antitrust* injury which is to say injury of the type the antitrust laws were intended to prevent. . . ." *Id.* at 489 (emphasis in original). NFO's claim of lost membership dues re-

sulting from members "who stopped marketing through NFO", 687 F.2d at 1209; App. at 62a, does not describe "competitive"[12] injury from an unlawful restraint of the market for the sale of milk. It describes an indirect injury in the "membership market" for the sale of NFO's collective bargaining services the purpose of which is to fix above a competitive level through collective action the prices to be paid to respondent's members for the sale of their farm commodities. *Cf. Associated General Contractors, supra*, 51 U.S.L.W. at 4145, nn. 41, 42 and text accompanying. To award antitrust damages arising from a weakening of respondent's price-fixing power would be "inimical to the purposes of [the antitrust laws]", *Brunswick Corp., supra*, at 488, for such "injury [is] not of 'the type that the [Sherman Act] was intended to forestall,' *Wyandotte Co. v. United States*, 389 U.S. 191, 202 (1967)." *Id.* at 487-88.

NFO's claimed loss of membership dues is but an indirect derivative result of whatever competitive injury NFO's *members* may have suffered directly in the sale of their milk as a result of defendant's alleged conspiracy. But it is not enough that NFO alleges "a causal connection between an antitrust violation and harm to [NFO] and . . . that the defendants intended to cause that harm." *Associated General Contractors, supra*, 51 U.S.L.W. at 4144. The "appropriate . . . focus [is] on the nature of plaintiff's alleged injury." *Ibid.* More important even than "the physical and economic nexus between the alleged violation and the harm to the plaintiff", *McCready, supra*, at 2548, is the concern of "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendants' conduct

[12] NFO is forbidden by its By-laws and tax exempt status under §501 (c)(5) of the Internal Revenue Code from engaging in business. *See* n. 6, *supra*.

unlawful and in providing a private remedy under §4."[13] *Ibid.* To award antitrust damages for a loss that diminishes respondent's ability to achieve monopoly power or to fix prices is fundamentally at odds with "the general principal that treble-damages recoveries should be linked to the pro-competition policy of the antitrust laws", *id.* at 2550, and "authorize[s] damages for losses which are of no concern to the antitrust laws." *Brunswick, supra,* 429 U.S. at 487.

There is no danger that denial of a treble damage remedy to plaintiffs such as NFO for lost membership dues and fees will permit antitrust violators to go unpunished or leave their victims without a remedy.[14] In addition to governmental enforcement agencies, there are other classes of plaintiffs more directly injured by defendants' alleged competitive restraints "whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement", *Associated General Contractors, supra,* 51 U.S.L.W. at 4145-46, and

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[13] While respondent's fundamental purpose of organizing farmers so as to eliminate competition among them in selling their commodities may be protected by §6 of the Clayton Act and the Capper-Volstead Act from the sanctions of the Sherman Act, it does not follow that respondent is entitled to the affirmative protections of that Act and the remedies of §4 for "injury" which affects only its "organizational and representational activities." *Associated General Contractors, supra,* 51 U.S.L.W. 4141, n. 10 and text accompanying; *see also, id.* at 4145. Petitioner does not contend that a Capper-Volstead cooperative may not recover under §4 for direct injury in the form of lost earnings from an unlawful restraint in the *market* for the sale of *its products*. But that is not this case.

[14] The Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-2307 affords a remedy in the form of damages and attorneys fees to "[a]ny person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, any provision of section 2303" of the Act which describes "prohibited practices". Among the "prohibited practices", the section includes the conduct charged by NFO, against the defendants AMPI and Mid-Am in their capacity as "handlers" subject to the Act's prohibitions.

whose losses can more efficiently be remedied by our judicial system. Neither the Justice Department[15] nor private treble damage plaintiffs[16] have shown any reluctance to monitor, control, sanction and deter antitrust violations by dairy cooperatives. Moreover, there was nothing to preclude NFO's members who are the direct competitive injury claimants from suing as a class for such damages as NFO seeks to recover on their behalf.[17] No policy objective of the antitrust laws is served by expanding the availability of the §4 damage remedy to allow membership dues recovery to an entity which has as its principal aim "to unite into one organization . . . all farmers engaged in the production of agricultural commodities". 510 F.Supp. at 388, App. at 78a.

C. The "Standing" Question Presented By This Petition Raises Issues Of Importance In The Enforcement Of The Antitrust Laws Beyond The Interests Of The Parties In This Case.

The question of who may sue for treble damages under §4 of the Clayton Act has been "characterized by doctrinal confu-

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[15] *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Borden Co.*, 308 U.S. 188 (1939); *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981); *United States v. AMPI*, 394 F.Supp. 29 (W.D. Mo. 1975); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. ¶61,508 (W.D. Mo. 1977).

[16] *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981); In re *Midwest Milk Monopolization Litigation, M.D.L. No. 83*, 379 F.Supp. 989, 991 (J.P.M.L. 1974); *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F.Supp. 608 (M.D. Ga. 1981); *see also* cases cited 687 F.2d at 1182; App. at 9a.

[17] NFO's Phase II suit was brought, originally on behalf of a class consisting of all farmers in the United States. The class was later narrowed to all dairy farmers in the United States. NFO failed to pursue certification of the class after its original motion to certify was denied "without prejudice" by the district court.

sion", *In re Industrial Gas Litigation*, 681 F.2d 514, 515 (7th Cir. 1982), which *McCready* and *Associated General Contractors* do not fully resolve. While the Court's opinion in *McCready* cites with apparent approval the expansive language of *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 659-660 (1961) that "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires", *McCready, supra*, 102 S.Ct. at 2545, n. 9, the decision acknowledges "two types of limitation on the availability of the §4 remedy to particular classes of persons and for redress of particular forms of injury." *Id.* at 2545-46.[18]

In holding that the plaintiff in *McCready* had standing to recover damages, the Court relied, in part, on the "policies identified in *Hawaii* and *Illinois Brick* [which] focused on the risk of duplicate recovery. . . ." *McCready, supra* at 2546. The Court relegated to a "subordinate" status, *id.* at 2546-47, n. 11, as the basis for the decision in *Illinois Brick*, "the evidentiary complexities and uncertainties" of proof, *Illinois Brick, supra*, 431 U.S. at 732, which the Court in *Illinois Brick*, however, described as the "principal basis for decision in *Hanover Shoe*." *Id.* at 731.

Several lower courts have read *Illinois Brick* to deny standing to plaintiffs who assert speculative theories of causation and damages that would mire the courts "with massive evi-

[18] In view of the acknowledged limitation barring the availability of the §4 remedy to the "indirect purchaser" class described in *Illinois Brick v. Illinois*, even though such persons suffer "injury", there would appear to be some question whether the reach of the Sherman Act and the §4 remedy extends to "'all who are made victims of the forbidden practices by whomever they may be perpetrated.' *Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 236 . . . ." *McCready, supra*, 102 S.Ct. at 2545. *See, Illinois Brick Co., supra*, 431 U.S. at 749 (Brennan J. dissenting).

dence and complicated theories." *Hanover Shoe, Inc., supra,* 391 U.S. at 493. *See, e.g., Reading Industries, Inc. v. Kennecott Copper Corp., supra*; *Mid-West Paper Products v. Continental Group, supra*; *GAF Corp. v. Eastman Kodak Co., supra*; *Liang v. Hunt,* 477 F.Supp. 891, 897 (N.D. Ill. 1979). *But see In re Beef Industry Litigation,* 600 F.2d 1148, 1166 n. 24 (5th Cir. 1979), *cert. denied,* 449 U.S. 905 (1980); *In re Bristol Bay, Alaska Salmon Fishery Antitrust Litigation, MDL No. 249,* 530 F.Supp. 36 (W.D. Wash. 1981).

Because this case presents a typical example of "a claim [which] rests at bottom on some abstract conception or speculative measure of harm" rather than "tangible economic injury", *McCready, supra,* at 2547 n. 11, it affords the Court a vehicle to develop further, for the instruction of the lower courts and the antitrust bar, the role that "insuperable difficulty" of proof, *Illinois Brick, supra* at 725 n. 3 (quoting *Hanover Shoe*) will have in deciding questions of standing under §4. To establish that NFO has lost or failed to attract members by reason of defendants' conduct would require an inquiry into the basis for the associational preferences of some 100,000 dairy farmers who produce milk in a ten-state area of the Midwestern United States[19] in which respondent claims its membership growth was stunted by defendants' conduct. Nothing approaching a "reasonable estimate of the cause of injury and of its amount", *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946), is possible save only by resort to an examination of each producer in the region to determine which of them refrained from associating as members of respondent by reason of defendants' unlawful conduct—by resort, that is, to the

[19] *Milk Production,* Crop Reporting Board, Statistical Reporting Service, United States Department of Agriculture, February, 1983, p. 20.

kind of "massive evidence and complicated theories" rejected in *Hanover Shoe, supra*, 392 U.S. at 493.[20]

This case also affords the Court an opportunity to further develop the concept of "antitrust injury" as an aspect of standing under §4 of the Clayton Act. Notwithstanding the teaching of *Brunswick* that §4 is intended to remedy only injury of the kind that the antitrust laws were designed to forestall, some courts have read the case narrowly,[21] while others have given *Brunswick* a more expansive reading as merging the requirements of "antitrust injury" with the general concept of standing as a prerequisite to suit under §4.[22] The writ should be granted to instruct the lower courts that §4 of the Clayton Act does not provide a remedy for losses which are unrelated to the procompetition policy of the antitrust laws.

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[20] If NFO lacks standing to recover damages for the *direct* competitive injury suffered by its members, as the Eighth Circuit holds, it is patent that NFO may not recover for *indirect* injury attributable to loss of membership dues and fees. NFO's claim that dues payments were affected adversely because dairy farmers were reluctant to join due to defendants' conduct is too remote, indirect and speculative to support standing under §4. *Associated General Contractors*, 51 U.S.L.W. at 4145 n. 46. *See Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1153 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54-55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[21] *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 888-89 (5th Cir. 1982), *judgment vacated*, —— U.S. ——, 51 U.S.L.W. 3627 (February 28, 1983). This Court remanded the case "for further consideration in light of" *Associated General Contractors*. *Id.* at 3633.

[22] *See, e.g., Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1168-69 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

II. The Eighth Circuit's Decision Holding That Proof Of A Relevant Geographic Market Is Not A Necessary Element In A "Rule Of Reason" Case Under §1 Of The Sherman Act Or Conspiracy To Monopolize Under §2 Is In Conflict With The Decisions Of This Court And Other Circuits.

Section 2 of the Sherman Act prohibits monopolization and attempts and conspiracies to monopolize. The Eighth Circuit affirmed the district court's dismissal of respondent's actual and attempted monopolization claims for failure to properly define a relevant geographic market or submarket, 687 F.2d 1192; App. at 29a, but reversed the dismissal of respondent's conspiracy to monopolize claim on the ground that "relevant market is not a necessary element of such a claim because actual attainment or 'dangerous probability' of monopoly power are not at issue," 687 F.2d at 1193; App. at 30a. Dismissal of the actual and attempted monopolization claims was mandated by the decisions of this Court and the prevailing rule in all circuits that definition of a proper "relevant market" is an essential element of an actual monopolization[23] and, except in the Ninth Circuit, an attempt to monopolize case.[24]

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[23] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[24] "An attempt to monopolize claim generally requires the specific intent to monopolize and a showing of a 'dangerous probability' of success, the latter of which is also examined by reference to the offender's share of the relevant market. *See, e.g., Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 177 . . . (1965); *Agra Shell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 285-287 (8th Cir.), *cert. denied*, 414 U.S. 1022 . . . (1973)." 687 F.2d at 1181; App. at 7a, (footnote omitted). *Accord, George R. Whitten, Jr. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *Dimmitt Agri Industries v. CPC Intern. Inc.*, 679 F.2d 516, 525-26 (5th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270

To hold unlawful under §2 of the Sherman Act joint efforts to pursue an end which, because of the absence of market power would be deemed lawful, is to defy logic and "the language in the controlling statute." *Associated General Contractors, supra*, at 4142. There is nothing in the language of §2 that would permit it to be read to require relevant market proof in actual and attempted monopolization cases but to dispense with such proof in a conspiracy case. The petition should be granted to resolve the question whether "conspiracy to monopolize" under §2 of the Sherman Act is nothing more than an "attempt to monopolize" involving more than one actor. *United States v. Paramount Pictures*, 334 U.S. 131, 171 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 785, 809 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 392, 398 (1905). If proof of a relevant market is an essential element in a §2 attempt case involving single firm conduct, there is no principled basis for dispensing with the requirement in a §2 conspiracy case.

A. The Eighth Circuit's Holding That Conspiracy To Monopolize Under §2 Of The Sherman Act Requires Proof Only Of A Concerted Specific Intent To Monopolize Which Affects "Some Appreciable Part Of Interstate Commerce" Is In Conflict With Decisions Of This Court And Other Circuits.

The Eighth Circuit holds that proof of a relevant market is not a necessary element of a §2 conspiracy claim "because

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(7th Cir. 1981), *cert. denied*, 102 S.Ct. 1277 (1982); *but see Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Greyhound Computer Corp. v. IBM*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) and *compare, ALW, Inc. v. United Airlines, Inc.*, 510 F.2d 52, 57 (9th Cir. 1975); *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

the essential elements of a Section 2 conspiracy claim are concerted action and specific intent to monopolize, such that it need only be further shown that the conspiracy affected 'some appreciable part of interstate commerce' ", 687 F.2d at 1182; App. at 8a, citing *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1971) and *United States v. duPont de Nemours & Co.*, 351 U.S. 377, 395 n. 23 (1956). While *Consolidated Laundries* does so hold, it has not been followed in the Second Circuit[25] and is in square conflict with "the better reasoned view", 3 J. Von Kalinowski, *Antitrust Laws and Trade Regulation*, §9.02[4], adopted in the Third, Fourth, Fifth, Eleventh and District of Columbia Circuits requiring proof of relevant market in a §2 conspiracy case.[26]

Reliance on *duPont*, as the basis for dispensing with relevant market proof in a conspiracy to monopolize case is misplaced. *Becker v. Safelite Glass Corporation*, 244 F.Supp. 625, 637 (D. Kan. 1965); *United States v. Johns-Manville Corpora-*

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[25] *Karlinsky v. New York Racing Association, Inc.*, 517 F.2d 1010, 1012 (2d Cir. 1975); *cf. Hudson Valley Asbestos Corp. v. Tougher H&P Co., Inc.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

[26] *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153-54 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1715 (1982); *V & L Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651-52 (E.D. Pa. 1975), *aff'd without opinion*, 565 F.2d 154 (3d Cir. 1977); *Weiss v. York Hospital*, 548 F.Supp. 1048, 1056 (M.D. Pa. 1982); *United States v. Johns-Manville Corp.*, 231 F.Supp. 690, 699-700 (E.D. Pa. 1963); *Advance Business Systems & Supply Co. v. SCM Corp.*, 287 F.Supp. 143, 153 (D. Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *American Football League v. National Football League*, 205 F.Supp, 60, 64-65 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963); *Sulmeyer v. Coca-Cola Company*, 515 F.2d 835, 850-51 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Bill Beasely Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 269 (D.D.C. 1976), *aff'd on other grounds*, 569 F.2d 666 (D.C. Cir. 1977).

tion, 231 F.Supp. 690, 699 (E.D. Pa. 1964).[27] In *Lessig v. Tidewater Oil Co.*, 327 F.2d 594 (9th Cir.), *cert denied*, 377 U.S. 993 (1964) the Ninth Circuit similarly relied on the *duPont* footnote 23 as the basis for its holding that proof of relevant market is not essential in an attempt *or* conspiracy to monopolize case. *Id.* at 474. But as explained in *Becker* and *Johns-Manville*, in the cases cited by the Court in the *duPont* footnote, it was observed only that "scope of the market was not in issue", not that relevant market proof is not essential in an attempt or conspiracy to monopolize case. *Becker, supra*, at 637.[28]

United States v. Consolidated Laundries, supra, on which the Eighth Circuit also relies as to the basis for dispensing with proof of relevant market in a §2 conspiracy case, held that the government's failure to prove dangerous probability of achieving monopoly power in a relevant market did not vitiate a conviction under §2 of the Sherman Act for conspiracy to monopolize because §2 makes it unlawful

> to conspire to monopolize "any part" of interstate commerce, without specifying how large a part must be affected. Hence, it is enough if some "appreciable part of interstate commerce is the subject" of the conspiracy. *United States v. Yellow Cab Co.* 332 U.S. 218, 225-226 . . . . (291 F.2d at 573).

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[27] In *Johns-Manville*, the district court rejected the Government's reliance on the *duPont* footnote (cited here by the Eighth Circuit) to support an argument that proof of a relevant market was immaterial in a conspiracy to monopolize case, noting that "[t]o adopt the Government's position would be to disregard the approach of [decisions in the] Supreme Court and the language concerning relevant market in such recent decisions as *International Boxing Club of New York v. United States*, 358 U.S. 242, 249-251 (1959). . . ." *Id.* at 699.

[28] As the *Becker* court pointed out, "we do not read *duPont* as justifying such a statement; nor do we read any of the cases cited in the *duPont* footnote as justifying such a statement." *Id.*

Accord, Salco Corp. v. General Motors Corp., 517 F.2d 567, 576 (10th Cir. 1975); *United States v. National City Lines, Inc.*, 186 F.2d 562, 573 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

But the "appreciable part of commerce" test was invoked in *Yellow Cab* to determine that the jurisdictional reach of the Sherman Act extended to an area involving less than the entire United States, not to dispense with the requirement of market definition in §2 cases. *United States v. Columbia Steel Co.*, 334 U.S. 495, 519-520 (1948).[29] Any notion that the "any part of . . . trade or commerce" language of §2 may be read to embrace any "appreciable part of commerce", whether constituting an economic market or not, was laid to rest in *duPont, supra*, at 404 and *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). *See* 3 Areeda & Turner *Antitrust Law*, ¶¶811, 833c. *See also, The Relevant Market Concept In Conspiracy To Monopolize Cases Under Section 2 of the Sherman Act*, 44 U. Chi. L. Rev. 805, 809 (1977).[30]

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[29] As explained by the Court in *Columbia Steel*: "We first lay to one side a possible objection to measuring the injury to competition by reference to a market which is less than nation-wide in area. The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States; we have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area. In *United States v. Yellow Cab Co.*, 332 U.S. 218, we sustained the validity of a complaint which alleged that the defendants had monopolized the cab operating business in four large cities. . . ." *Id.* at 519-20. *See id.* at 521-522.

[30] Commenting on the Second Circuit's reliance in *United States v. Consolidated Laundries Corp.* on the "any part of trade or commerce" discussion in *Yellow Cab*, the author notes:

> This rationale is wholly unpersuasive. The "any part" language of section 2 is applicable to all three of the enumerated offenses. If the "any part of the trade or commerce" language is held to

B. In Holding That Business Conduct May Be Condemned As "Unreasonable" In The Absence Of A Defined Market, The Court Below Has Unsettled And Confused The Settled Course Of Decisions In §1 Non-*Per Se* Cases.

The Eighth Circuit's holding that "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade", 687 F.2d at 1193; App. at 30a, notwithstanding the absence of relevant market definition, is in conflict with decisions of this Court, and every circuit that has considered the question.[31] *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 615 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948). As explained by the Court in *Columbia Steel Co.*, in order to judge the reasonableness of an alleged restraint in §1 non-*per se* case:

> It is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. . . . In determining what constitutes unreasonable restraint, . . . we look . . . to the percentage of business controlled, the strength of the remaining competition . . . and other characteristics of the market. *Id.* at 527.

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obviate the need for market definition in section 2 conspiracy cases, a similar conclusion would appear to be compelled for actual and attempted monopolization cases. . . . The relevant market requirement derives not from the "any part" language of section 2 but rather from the term "monopolize".

Id. at 809.

[31] *See, e.g., Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133-34 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978); *American Motors Inn, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1247-48 (3d Cir. 1975); *Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274-76 (9th Cir. 1975); *TV Signal Co. of Aberdeen v. American Telephone and Telegraph*, 617 F.2d 1302, 1309, n. 8 (8th Cir. 1980) ("where the Rule of Reason governs in §1 cases proof of relevant market is necessary to demonstrate the unreasonableness of the restraint.")

The effect of the Eighth Circuit's decision is to convert the Sherman Act into a catchall remedy to reach "unfair" or "business tort" conduct contrary to this Court's admonition that to amount to an unreasonable restraint of trade, "predatory" conduct must have an effect greater than its effect upon a plaintiff's business because "the antitrust laws . . . were enacted 'for the protection of *competition* not *competitors*.'" *Brunswick Corp., supra*, at 488 (emphasis in the original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

The anamolous result of the Eighth Circuit's analyses is thus brought full circle. If "an unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade", it is illogical and incongruous to hold that the relevant market definition that this Court and all circuits require in a non-*per se* §1 conspiracy case may be dispensed with in a conspiracy case under §2. As one commentator notes:

> [I]n those instances where power [in a defined market] is a prerequisite to holding an agreement to be an unreasonable restraint of trade . . . it would make no sense to hold the same agreement to be offensive to §2 without power. To require power under §1 before condemning a particular agreement is necessarily to say that the arrangement is . . . not harmful in the absence of power. That policy conclusion cannot sensibly be avoided or negated by the simple trick of calling the agreement a conspiracy to monopolize.

3 Areeda & Turner, *Antitrust Law*, ¶839 at 359.

The Eighth Circuit's decision reflects a conflict among the circuits between the "classic" requirement of power in a defined market to support a §2 attempt or conspiracy claim and the "expansionist" role of §2 as a tool to control undesirable business conduct. 3 Areeda & Turner *Antitrust Law*, ¶821,

831-833; Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer To The Riddle Of Section Two*, 72 Mich. L. Rev. 375, 418-430 (1974); Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305-07 (1956). With respect to the "attempt to monopolize" offense, The National Commission for the Review of Antitrust Laws and Procedures[32] noted that "particularly in certain areas of Sherman Act Section 2 enforcement, unclear and somewhat confused legal standards are an important contributing factor to unnecessary delay and ineffective remedies in antitrust litigation." [33]

The Commission's comments with respect to "attempt to monopolize" apply with equal force to "conspiracy to monopolize" as the conflict among the circuits with respect to the requirement of relevant market proof demonstrates. This case should be reviewed to decide the question whether "conspiracy" under §2 may be used, as suggested by the court below, following *Lessig v. Tidewater Oil Co.*, *supra*, and its progeny, to "transform[] the character of section 2 from an antitrust law to a general statutory prohibition of unfair competition" [34] to reach business conduct aimed at a single competitor rather than competition in a defined market.

To hold, as the Eighth Circuit does here that a §2 conspiracy claim may be supported by a "minimal showing . . . as to

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[32] The Commission was convened by Executive Order in June 1978 to study methods of expediting complex antitrust litigation and improving the effectiveness of antitrust remedies. Exec. Order No. 12,022, 3 C.F.R. §155 (1977) as amended by Exec. Order No. 12052, 43 Fed. Reg. 15,133 (1978).

[33] National Commission For The Review of Antitrust Laws and Procedures, *Report To The President and the Attorney General*, at 143-44 (1979).

[34] P. Levine, *Attempt To Monopolize Under the Sherman Act: Defendant's Market Power As A Requisite To A Prima Facie Case*, 73 Colum. L. Rev. 1451, 1457 (1973).

the product and geographic context of the alleged conspiracy", 687 F.2d at 1193, App. at 30a, is to ignore this Court's early teaching that §2 is concerned with economic markets definable in terms that have "both a geographic and distributive significance." *Standard Oil Co. v. United States*, 221 U.S. 1, 61 (1911). The Eighth Circuit's "product and geographic context" standard is an amorphous concept devoid of definable economic content. The petition should be granted to instruct the lower courts faced with antitrust complaints that judicial resources should be reserved for cases dealing with competitive restraints affecting identifiable *markets* which constitute "any part" of commerce.

III. The Eighth Circuit's Failure To Apportion Its Award Of Attorney's Fees And Costs On Appeal To Reflect The Extent To Which NFO Failed To Prevail Ignores The Statutory Language And Is In Conflict With The Holding Of Other Circuits.

Section 4 of the Clayton Act, 15 U.S.C. § 15 provides for an allowance of "cost of suit including reasonable attorney's fees" to a plaintiff who has established injury and damages "by reason of" a violation of the antitrust laws. The Eighth Circuit's December 13, 1982 Order, 696 F.2d 1210 (8th Cir. 1983); P. App. at 2a, awarded NFO $151,000 in attorney's fees for work done on appeal. The court refused to apportion the award of attorney's fees to reflect the extent to which NFO failed to prevail on the merits. 696 F.2d at 1211-12; P. App. at 3a-4a.

NFO failed in its claim against ARSPC and the Eighth Circuit affirmed the district's judgment of dismissal. 687 F.2d at 1179; App. at 3a. NFO also failed to prevail in four of its claims against the remaining defendants: claims numbered III (Attempt to Monopolize), IV (Monopolizations), V (Mergers and Monopoly-AMPI) and VI (Merger and Acquisitions

Tending to Lessen Competition and to Create a Monopoly-Mid-Am). NFO pressed all of these unsuccessful claims, which constituted a substantial and disproportionate aspect of its case, at trial and on appeal. 687 F.2d at 1191-92, 1206; App. at 27a-29a, 57a-59a. Yet the court herein refused to apportion the award of attorney's fees accordingly.

The Eighth Circuit's approach encourages antitrust plaintiffs to assert and pursue every possible antitrust claim, knowing that they will be compensated for time spent on all claims, if successful on any. Such a result overtaxes the entire judicial system by encouraging complex litigation and expensive discovery on claims unworthy of the cost. While the Ninth Circuit has reached a conclusion similar to that of the Eighth Circuit in this case, the Second and Fourth Circuits have held that an award of attorney's fees must be apportioned to reflect the degree to which an antitrust plaintiff prevailed.[35]

The Eighth Circuit's Order also awarded NFO certain "expenses" [36] which have previously been held by other circuits

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[35] *Compare Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 411 F.Supp. 627 (S.D.N.Y. 1976), *modified on other grds.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 70 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) *with Twin City Sportservice, Inc. v. Finley*, 676 F.2d 1291, 1312-1313 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982). *See also Henley v. Eckerhart*, No. 81-1227 (8th Cir. Sept. 28, 1981) (unpublished), *cert. granted*, 102 S.Ct. 1610 (1983).

[36] The Eighth Circuit awarded $8,363.95 for the following items of "recoverable expenses above the attorneys' fees and court costs previously awarded": air fares, meals and lodging, telephone, express mail and Federal Express/Emery Air Freight. 696 F.2d at 1212; P. App. at 4a.

to be non-taxable costs of litigation.[37] Under §4, a successful antitrust plaintiff has the right to recover the "cost of suit." Properly interpreted, the phrase "cost of suit" means only those statutory costs specifically identified in 28 U.S.C. §1920 and Federal Rule of Civil Procedure 54(d). If Congress had intended the "cost of suit" under §4 to mean expenses of litigation, there would have been no reason for adding the words "including a reasonable attorney's fee," since an attorney's fee would necessarily be a part of the expenses incurred in conducting the lawsuit.[38]

Moreover, the same words or phrases used in two statutes pertaining to the same subject matter should be construed in the same sense. Sands, *Sutherland Statutory Construction*, §51.02 at 290 (1973). There being no significant difference between "cost of suit" in the Clayton Act and "cost of suit" in Rule 54(d) and 28 U.S.C. §1920, there is simply no reasoned basis for departing from the accepted interpretation under Rule 54(d) for what are recoverable expenses. *See, e.g., State of Illinois v. Sangamo Construction Co., supra,* at 866.

Virtually all courts have rejected the interpretation of §4 by the Eighth Circuit and have limited prevailing plaintiffs

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[37] *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n. 75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Straus v. Victor Talking Machine Co.*, 297 F. 791, 806-807 (2d Cir. 1924); *State of Illinois v. Sangamo Construction*, 657 F.2d 855, 866 (7th Cir. 1981); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 223-224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

[38] This interpretation of §4 of the Clayton Act was espoused in the leading decision of *Straus v. Victor Talking Machine Co., supra.* The *Straus* interpretation of §4 was, until recently, uniformly followed. The exception is *Copper Liquor v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir.), *reh. gr.*, 1982-83 CCH Trade Cas. ¶65,079 (1982), the only authority relied upon by the court below to support its position.

to recovery of costs specifically identified in 28 U.S.C. §1920. Such a ruling would integrate the rules regarding costs of suit.

CONCLUSION

The decision of the court below raises questions of importance relating to the remedial purposes of the antitrust laws that require answer for the instruction of the Federal judiciary and the antitrust bar. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S APPENDIX A

STATUTES INVOLVED, PARTIAL TEXT

1. Section 1 of the Sherman Act, 15 U.S.C. §1, as amended, which provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

2. Section 2 of the Sherman Act, 15 U.S.C. §2, which provides in pertinent part:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with another person . . . to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony. . . .

3. Section 1 of the Capper-Volstead Act, 7 U.S.C. §291 which provides, in pertinent part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of person so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

4. Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15, provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

5. Section 6 of the Clayton Antitrust Act, 15 U.S.C. §17, provides in pertinent part:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

PETITIONER'S APPENDIX B

Robert B. ALEXANDER, et al.,

v.

NATIONAL FARMERS ORGANIZATION,
Appellant,

v.

ASSOCIATED MILK PRODUCERS, INC.,
Mid-America Dairymen, Associated Reserve Standby Pool Cooperative, Appellees.
Wesley Johnson, Gary Hanman, Harold S. Nelson and David Parr, Central Milk Producers Cooperative, Appellee.

Robert B. ALEXANDER, et al.,

v.

NATIONAL FARMERS ORGANIZATION,
Appellee,

v.

ASSOCIATED MILK PRODUCERS, INC.,
Appellant.
Mid-America Dairymen; Associated Reserve Standby Pool Cooperative; Wesley Johnson; Gary Hanman; Harold S. Nelson; David Parr; Central Milk Producers Cooperative.

Robert B. ALEXANDER, et al.,

v.

NATIONAL FARMERS ORGANIZATION,
Appellee,

v.

ASSOCIATED MILK PRODUCERS, INC.,
Mid-America Dairymen, Inc., Appellant.
Associated Reserve Standby Pool Cooperative; Wesley Johnson; Gary Hanman; Harold S. Nelson;

David Parr; Central Milk Producers Cooperative.
Nos. 81-1235 to 81-1237.
United States Court of Appeals,
Eighth Circuit.
Dec. 13, 1982.

Before HEANEY and McMILLIAN, Circuit Judges, and BENSON,* Chief Judge.

ORDER

Following our decision in *Alexander v. National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), the National Farmers Organization (NFO) moved this Court for an award of expenses on appeal, including attorneys' fees, court costs, and other miscellaneous costs.[1] We have reviewed NFO's motions, memoranda, and affidavits; the various defendants' memoranda in opposition to NFO's requests; and NFO's response to the defendants' objections. We make awards based on the reasoning below.

[1] On the issue of attorneys' fees expended on appeal, NFO requests the following amounts to pay for services provided by the firm directing its appeal and other attorneys involved:

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* The Honorable PAUL BENSON, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

[1] We note that NFO only requests fees and costs connected to the appeal of its antitrust counterclaim, styled "Phase II" of the appeal in its schedule of fees and costs. We also treat NFO's request as seeking expenses from defendants found liable under its antitrust counterclaim, thereby excluding any expense claims against Associated Reserve Standby Pool Cooperative (ARSPC).

Firm/ Attorney	Total Phase II Hours	Total Phase II Hours X Proposed Billing Rates
Akin, Gump, Strauss, Hauer & Feld	2,348.70	$230,010.00
Marvin Beshore	333.30	19,998.00
Richard A. Green	42.45	6,367.50
TOTALS	2,724.45	$256,375.50

NFO considers this total to be the basic, or "lodestar," fee to which it is entitled, representing a reasonable number of hours expended on appeal multiplied by a reasonable legal rate per hour. NFO further requests that we enhance this award by fifty percent (applying a multiplier of 1.5 to the lodestar figure) in consideration of the difficulty of this appeal and the quality of NFO's representation on appeal. Thus, NFO's total request for attorneys' fees expended on appeal is $384,562.

We have considered the nature of legal services provided to NFO on this appeal, the quality of those services, the myriad of legal and factual questions raised, and the outcome of the case. We reduce the number of hours reasonably expended on NFO's behalf to those necessary to pursue this type of appeal without duplication of time and expertise. We also find that $125 per hour is the maximum reasonable legal rate applicable to any services provided, based on billing rates in this Circuit over the time period taken to prepare this appeal. We adjust the rates applied to the various services provided in that preparation accordingly. Under this ap-

proach, we find that the lodestar figures applicable to NFO's representatives on appeal are:

Firm/ Attorney	Reasonable Phase II Hours X Reasonable Billing Rates
Akin, Gump, Strauss, Hauer & Feld	$130,000
Marvin Beshore	16,000
Richard A. Green	5,000
TOTAL	$151,000

We refuse to enhance this total lodestar figure, as requested by NFO, since we do not see this as an extraordinary case meriting such enhancement. We do not detract from the importance of the case, but NFO's success here can be attributed to long hours and meticulous preparation, which we feel have been reasonably considered in our calculation of the lodestar figure. We also decline to apportion the award of attorneys' fees to NFO based on the defendants' conceptions of the scope of NFO's victory, as suggested in opposing memoranda filed by Associated Milk Producers, Inc. (AMPI) and Central Milk Producers Cooperative (CMPC). The question of apportioning attorneys' fees based on the number of issues on which a party prevails is pending before the Supreme Court in its grant of certiorari in *Hensley v. Eckerhart*, —— U.S. ——, 102 S.Ct. 1610, 71 L.Ed.2d 847 (U.S.1982). We do not reach that apportionment question here, because the issues raised on this appeal are so interrelated that we cannot say that any of the services compensated out of this award were not part of NFO's success on appeal. Also, we have considered the ultimate outcome of the appeal in our calculation of the lodestar figure and our refusal to enhance that figure by the

suggested 1.5 multiplier. Therefore, we order attorneys' fees in favor of NFO in the amount of $151,000.

[2] NFO further requests its costs on appeal pursuant to Fed.R.App.P. 39, in essence the costs of copying briefs and the appendix in this case, in the amount of $11,510.50. *See Alexander v. National Farmers Organization, supra,* 687 F.2d at 1210. NFO bases this request on a copying cost of fifty cents per page. We find this per page charge unreasonable in this case, and order these court costs be paid by the defendants only to the extent of twenty cents per page, for a total of $4,604.20.

[3] Finally, NFO seeks an award of expenses on appeal totaling $17,195.05, covering disbursements allegedly attributable to pursuing this appeal. NFO asserts these expenses are recoverable under language in the Clayton Act, as amended, authorizing awards of "the cost of suit, including a reasonable attorney's fee" in antitrust damages actions, 15 U.S.C. § 15 (Supp. V 1981), and in antitrust suits seeking injunctive relief, 15 U.S.C. §26 (1976). NFO recognizes a split in the circuits on whether this language authorizes an award of expenses beyond those normally considered as court costs. *Compare State of Illinois v. Sangamo Construction Co.,* 657 F.2d 855, 866 (7th Cir. 1981) ("cost of suit" in Clayton Act same as "costs of suit" in Fed.R.Civ.P. 54(d) and 28 U.S.C. § 1920 (1976 & Supp. II 1978)) *with Copper Liquor, Inc. v. Adolph Coors Co.,* 684 F.2d 1087, 1100-1101 (5th Cir. 1982) (expenditures not listed in 28 U.S.C. § 1920 (1976 & Supp. II 1978) recoverable under 15 U.S.C. § 15 (Supp. V. 1981)). We are inclined to agree with a liberal interpretation of the Clayton Act which allows an award of actual expenses incurred on appeal, whether considered part of the "cost of suit" or part of a "reasonable attorney's fee." *See Copper Liquor, Inc. v. Adolph Coors Co., supra,* 684 F.2d at 1101.

We do not agree, however, that all items listed in Schedule C of the affidavit supporting NFO's motion for a disbursements award can be attributed solely to this appeal, as opposed to being general overhead normally paid by law firms and lawyers as a cost of doing business. We also reduce NFO's claims on some items which are attributable to this appeal to reflect a reasonable amount of expenses necessary for an appeal of this magnitude. We decide that only the following items are recoverable expenses above the attorneys' fees and court costs previously awarded:

Item	Firm/Attorney	Amount
Air Fares, Meals & Lodging	Akin, Gump, Strauss, Hauer, & Feld (Akin Firm)	$3,953.00
	Marvin Beshore	968.35
Telephone	Akin Firm	1,529.00
	Marvin Beshore	698.96
Express Mail	Akin Firm	1,192.14
Federal Express/ Emory Air Freight	Akin Firm	32.50
	TOTAL	$8,363.95

This award of expenses is consistent with our allowing only reasonable attorneys' fees and court costs, and with the goal of encouraging private enforcement of the antitrust statutes.

We therefore order awards in favor of NFO of $151,000 for reasonable attorneys' fees, $4,604.20 for court costs, and $8,363.95 for reasonable excess expenses incurred in pursuing this appeal, to be paid in equal shares by defendants AMPI, CMPC, and Mid-America Dairymen, Inc. (Mid-Am).